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In the Supreme Court of the United States

OCTOBER TERM, 1979

CERTIFIED MEATS, INC. AND COUNTRY PRIDE, INC.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 10-15) is not officially reported. The Board's supplemental decision and order (Supp. Pet. App. 1-38) is reported at 235 N.L.R.B. No. 184.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1979. The petition for a writ of certiorari was filed on November 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that Country Pride is a successor employer to Certified Meats and therefore the two companies are jointly and severally liable for remedying Certified Meats' unfair labor practices.

2. Whether petitioners were denied due process.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at page 2 of the petition. Also relevant is Section 8(a)(3):

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

STATEMENT

1. On October 17, 1972, the Board issued its decision and order in *Certified Meats, Inc.*, 199 N.L.R.B. 775, in which it found that Certified Meats violated Section 8(a)(3) and (1) of the Act by its discriminatory discharge of eleven employees. The Board ordered Certified Meats to offer reinstatement to two employees and to pay them as well as the nine others, who had been offered reinstatement, for any loss of earnings suffered because of the unlawful discharges. On August 3, 1973, the court of appeals enforced the order. *NLRB* v. *Certified Meats, Inc.*, 83 L.R.R.M. 2992 (7th Cir. 1973) (No. 73-1096). In

1978 the Board found that petitioner Country Pride, Inc., was a successor to petitioner Certified Meats and therefore was jointly and severally liable for remedying Certified Meats' unfair labor practices and making whole the employees in the amount of about $15,000. (Supp. Pet. App. 36-38).

Certified Meats began operations in February 1971 in Fort Wayne, Indiana, as a meat processor engaged in boning hams (Supp. Pet. App. 2, 29; Tr. 148).[1] William D. Contris, Karen Sue Hufford, and their attorney were the incorporators of Certified Meats and comprised the Board of Directors. Contris was Certified Meats' president, and Karen Hufford was its secretary-treasurer (Supp. Pet. App. 29; Tr. 148-149, 157-158). Contris owned 100 percent of Certified Meats' stock (Supp. Pet. App. 29; Tr. 158).

Country Pride was incorporated on April 20, 1972 in Creston, Ohio (Supp. Pet. App. 30; Tr. 148). Contris owns 400 of the 600 shares of Country Pride stock and Karen Hufford's brother, Steve Hufford, owns the remaining 200 shares (Supp. Pet. App. 30; Tr. 148, 159). At the time of the backpay hearing, Karen Hufford was the president and Contris was the secretary-treasurer of Country Pride (Supp. Pet. App. 30; Tr. 147-149, 360.)

In May or June of 1973, Certified Meats began processing diced beef for Country Pride which was its only customer for this service (Supp. Pet. App. 30; Tr. 152-154, 159-160, 197-200). Country Pride sold the meat to Stouffer Food, and other major customers (Tr. 153-154, 218-221, GCX 21-22). In mid-September 1973, Country Pride moved into the Fort Wayne plant. It

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[1] "Tr." references are to the transcript of the hearing below; "GCX" references refer to the General Counsel's exhibits therein.

bought substantially all of Certified Meats' physical assets and assumed Certified Meats' rent and utility payments, although the lease remained in Certified Meats' name and the utilities remained billed to Certified Meats (Supp. Pet. App. 31, 32-33; Tr. 168, 172-173, 187). Country Pride hired both of Certified Meats' remaining employees (Supp. Pet. App. 31, 36; GCX 13, 16). Country Pride produced a processed beef product similar to Certified Meats' and sold it to some of Certified Meats' customers (Supp. Pet. App. 32, 36; Tr. 166-174, 218-221, 229-239, GCX 21-26).

Country Pride continued to use Certified Meats' Department of Agriculture Inspection Number 6900. In February 1974, the Department of Agriculture rescinded this number due to temporary inactivity at the Fort Wayne plant. Karen Hufford wrote to the Department, at the behest of Contris, to have the number reinstated. Thereafter, Country Pride continued to use the number, which was registered in Certified Meats' name (Supp. Pet. App. 31-32; Tr. 163, 171-173, 183, 206-208, 223-226).

The administrative law judge, whose decision was adopted by the Board, rejected petitioners' argument that there was a hiatus between the time Country Pride took over the business and Certified Meats ceased operations (Supp. Pet. App. 2, 35). He also rejected the argument that since Country Pride diced beef only as a by product of its production of short ribs, there was no continuity of business enterprise. He concluded that "for all practical purposes Country Pride continued to engage in the same business as Certified [Meats] in that it was engaged as a beef processor" (Supp. Pet. App. 36).

2. The court of appeals upheld the Board's decision and enforced its order, stating that "[w]e have carefully and thoroughly examined the record as a whole and we conclude that substantial evidence supports the Board's finding that Country Pride is a successor employer" (Pet. App. 14). The court also rejected petitioners' contention that, due to the administrative law judge's interruption of their counsel during cross-examination, they were denied a fair hearing (*ibid.*).

ARGUMENT

1. Petitioners challenge (Pet. 4-6) the sufficiency of the evidence for a finding that Country Pride is the successor to Certified Meats. In *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 184 (1973), this Court held that the Board may require a successor employer to remedy a predecessor's unfair labor practices where the successor acquired the business with knowledge of the predecessor's unfair labor practices and where "substantial continuity" of the identity of the business enterprise is maintained. Petitioners essentially maintain that the latter condition was not met because Certified Meats was "defunct" before Country Pride took over the business. The Board, upheld by the court of appeals, found that the evidence did not support that claim. Resolution of that issue presents only an evidentiary issue which does not warrant review by this Court. *Universal Camera* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Petitioners' reliance on *Textile Workers* v. *Darlington Manufacturing Co.*, 380 U.S. 263 (1965), is misplaced. In *Darlington*, stockholders approved the board of directors' decision to liquidate the corporation, and plant machinery and equipment was sold piecemeal at auction. *Id.* at 266. In contrast here, after Certified Meats' unfair

labor practice hearing (at which they were witnesses). Certified Meats' two main principals organized another corporation which bought substantially all of Certified Meats' physical assets and produced similar beef products some of which were sold to some of Certified Meats' former customers.[2]

2. Petitioners' additional contention that they were denied a fair hearing because of the interruption by the administrative law judge similarly raises no issue warranting further review. As the court of appeals noted, "petitioners * * * are unable to cite a single authority in direct support of the assertions[3] and they fail to point out a specific instance where the administrative law judge prevented counsel from obtaining testimony from a witness" (Pet. App. 14).

Petitioners also contend (Pet. 8) that the judge was "biased" because he allegedly withdrew from the case and then reconvened the hearing. However, the record reveals nothing which indicates bias. At one point in the hearing, the judge did respond to counsel for petitioner's protest of his questioning witnesses and request that he withdraw from the case by stating that he would do so (Tr. 313-314). However, after a ten-minute recess, during which the judge consulted with another administrative

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[2]Although Certified Meats ceased dicing beef for more than thirty days (because of a beef shortage due to a farmers' strike prior to Country Pride's takeover). Certified Meats retained two employees on the payroll in anticipation of resuming production, and both employees were immediately hired upon Country Pride's acquisition of the business (Supp. Pet. App. 31; Tr. 201-203, GCX 13, 16).

[3]Such conduct in fact does not amount to denial of a fair hearing. See, *e.g.*, *NLRB* v. *Air Flow Sheet Metal, Inc.*, 396 F. 2d 506, 508 (7th Cir. 1968); *NLRB* v. *Superior Sales, Inc.*, 366 F. 2d 229, 233 (8th Cir. 1966).

law judge, he determined to continue with the hearing and advised petitioners that they could renew their motion before the Board (Tr. 315-317). The judge's immediate reversal of his prior ruling, without more, hardly indicates bias.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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